No. 03-515

Supreme Court, U.S.
FILED
DEC 5 - 2003
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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2003**

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**STATE OF ARIZONA**

Petitioner,

vs.

**ANTOIN JONES**

Respondent.

---

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

Respondent, Antoin Jones, requests permission to file the attached Respondent's Brief In Opposition without prepayment of costs and to proceed *in forma pauperis*.

Respondent proceeded through all phases of the Arizona Superior Court and the Arizona Supreme Court as an indigent defendant with counsel appointed by Maricopa County. An affidavit supporting this motion is attached.

RESPECTFULLY SUBMITTED this 5th day of December, 2003.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

EDWARD FILMORE MCGEE
Deputy Public Defender
411 North Central Ave., Suite 670
Phoenix, Arizona 85004
(602) 506-0924
State Bar Attorney No. 004235
*Lawyer for Respondent*

AJ
11-13-03

**AFFIDAVIT IN SUPPORT OF MOTION**
**FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, **ANTOIN JONES**, am the respondent in the preceding captioned case. In support of my motion to proceed without being required to prepay fees, costs or give security, I state that because of my poverty I am unable to pay the costs of this case or to give security, and I believe I am entitled to redress.

I SWEAR that the statements made below relating to my ability to pay costs of proceedings in this case are true:

1. I am presently unemployed, except for duties related to my incarceration and I have not been employed since I was arrested for this offense. AJ
2. I am presently not receiving income, or have received income by employment since ~~by~~ my incarceration for this offense.
3. I have no cash on hand sufficient to pay for costs, or checking or savings accounts maintained by banking institutions.
4. I do not own real property, stocks, bonds, notes or other assets that could be used to pay for costs and fees in this case.
5. I have been represented at public expense during all phases of proceedings.
6. I have a single dependent child, residing in the custody of his mother to whom I am not married.

I declare under penalty of perjury that the foregoing is true and correct.

OFFICIAL SEAL
BARBARA SHEARER
NOTARY PUBLIC - State of Arizona
PINAL COUNTY
My Comm. Expires May 15, 2007

ANTOIN JONES

Dated and signed this 13 day of November, 2003.

My Commission Expires: May 15, 2007

Barbara Shearer
Notary Public

AJ
11-13-03

**AFFIDAVIT OR DECLARATION**
**IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, **ANTOIN JONES**, am the respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis,* I state that because of my poverty I am unable to pay the costs of this case or to give security therefore; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| **Income source** | **Average monthly amount during the past 12 months** | | **Amount expected next month** | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $ 0 | $ 0 | $ 0 | $ 0 |
| Self-employment | $ 0 | $ 0 | $ 0 | $ 0 |
| Income from real property (such as rental income) | $ 0 | $ 0 | $ 0 | $ 0 |
| Interest and dividends | $ 0 | $ 0 | $ 0 | $ 0 |
| Gifts | $ 0 | $ 0 | $ 0 | $ 0 |
| Alimony | $ 0 | $ 0 | $ 0 | $ 0 |
| Child Support | $ 0 | $ 0 | $ 0 | $ 0 |
| Retirement (such as social security, pensions, annuities, insurance) | $ 0 | $ 0 | $ 0 | $ 0 |
| Disability (such as social security, insurance payments) | $ 0 | $ 0 | $ 0 | $ 0 |
| Unemployment payments | $ 0 | $ 0 | $ 0 | $ 0 |
| Public-assistance (such as welfare) | $ 0 | $ 0 | $ 0 | $ 0 |
| Other (specify): | $ 0 | $ 0 | $ 0 | $ 0 |
| **Total monthly income:** | $ 0 | $ 0 | $ 0 | $ 0 |

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| | You | Your spouse |
|---|---|---|
| Transportation (not including motor vehicle payments) | $ 0 | $ N/A |
| Recreation, entertainment, newspapers, magazines, etc. | $ 0 | $ N/A |
| **Insurance (not deducted from wages or included in mortgage payments)** | | |
| Homeowner's or renter's | $ 0 | $ N/A |
| Life | $ 0 | $ N/A |
| Health | $ 0 | $ N/A |
| Motor Vehicle | $ 0 | $ N/A |
| Other: _____ | $ 0 | $ N/A |
| **Taxes (not deducted from wages or included in mortgage payments)** | | |
| (specify): _____ | $ 0 | $ N/A |
| **Installment payments** | | |
| Motor Vehicle | $ 0 | $ N/A |
| Credit card(s) | $ 0 | $ N/A |
| Department store(s) | $ 0 | $ N/A |
| Other: _____ | $ 0 | $ N/A |
| Alimony, maintenance, and support paid to others | $ 0 | $ N/A |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | $ 0 | $ N/A |
| Other (specify): _____ | $ 0 | $ N/A |
| **Total monthly expenses:** | $ 0 | $ N/A |

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11-13-03

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| NONE | NONE | NONE | $ 0 |
| | | | $ |
| | | | $ |

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| N/A | N/A | N/A | $ 0 |
| | | | $ |
| | | | $ |

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Financial Institution | Type of account | Amount you have | Amount your spouse has |
|---|---|---|---|
| NONE | NONE | $ 0 | $ 0 |
| | | $ | $ |
| | | $ | $ |

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value NONE

☐ Other real estate
Value NONE

☐ Motor Vehicle #1
Year, make & model NONE
Value

☐ Motor Vehicle #2
Year, make & model NONE
Value

☐ Other assets
Description NONE
Value

AJ
11-13-03

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---|---|---|
| NONE | $ 0 | $ 0 |
| | $ | $ |
| | $ | $ |

7. State the persons who rely on you or your spouse for support.

| Name | Relationship | Age |
|---|---|---|
| Darnell Thomas Jones | Son | 7 |
| | | |
| | | |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

| | You | Your spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home)<br>Are real estate taxes included? ☐ Yes ☐ No<br>Is property insurance included? ☐ Yes ☐ No | $ 0 | $ N/A |
| Utilities (electricity, heating, fuel, water, sewer, and telephone) | $ 0 | $ N/A |
| Home maintenance (repairs and upkeep) | $ 0 | $ N/A |
| Food | $ 0 | $ N/A |
| Clothing | $ 0 | $ N/A |
| Laundry and dry-cleaning | $ 0 | $ N/A |
| Medical and dental expenses | $ 0 | $ N/A |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid—or will you be paying—an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Respondent is a singleman who has been on death row for the past four years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Nov 13, _____, 2003

OFFICIAL SEAL
BARBARA SHEARER
NOTARY PUBLIC - State of Arizona
PINAL COUNTY
My Comm. Expires May 15, 2007

Barbara Shearer

_____
(Signature)

No. 03-515

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2003**

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**STATE OF ARIZONA**

Petitioner,

vs.

**ANTOIN JONES**

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI**

**TO THE**

**SUPREME COURT OF THE STATE OF ARIZONA**

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

EDWARD FILMORE MCGEE
Deputy Public Defender
(Counsel of Record)
411 North Central Ave., Suite 670
Phoenix, Arizona 85004
(602) 506-0924
State Bar Attorney No. 004235
*Lawyer for Respondent*

## QUESTION PRESENTED FOR REVIEW

Whether the Arizona Supreme Court's interpretation of this Court's holding in *Ring v. Arizona,* 536 U.S. 584 (2002) (*Ring II*), violates the Sixth Amendment to the United States Constitution by requiring a jury to determine aggravating and mitigating factors?

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

## OPINION BELOW

The Arizona Supreme Court's opinions involving Antoin Jones (Jones or Respondent) are reported respectively at *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (Ariz. 2003) (referenced as *Ring III* by Petitioner) and *State v. Jones*, ___ Ariz. ___, 72 P.3d 1264 (Ariz. 2003).

A jury convicted Jones of first-degree murder, kidnapping and two counts of sexual assault of a minor. The trial court, sitting without a jury, sentenced Jones to death, having found that the aggravating elements in the case outweighed the mitigating factors.

The case proceeded to mandatory review by the Arizona Supreme Court. In the interim, this Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002) (referenced as *Ring II* by Respondent) (reversing *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001) (*Ring I*)). On remand to the Arizona Supreme Court, Jones' case was consolidated with all capital cases then on direct appeal from the state's trial courts. *Ring III* resolved numerous issues common to capital defendants on appeal in Arizona, including whether error could be harmless under Arizona's "superseded capital sentencing statute...." *Jones*, ___ Ariz. ___, 72 P.3d 1267 at ¶ 6.

In declaring that Jones was entitled to resentencing by a jury, the Arizona Supreme Court ruled that some of the trial court findings were harmless error, and that some were reversible. The Arizona court held, for example, that where the age of a victim constitutes an element of another crime of which the defendant was convicted by the jury, it was harmless error for the trial judge to have made this same finding in the capital sentencing process. *Id.*, ___ Ariz. at ___, 72 P.3d at 1267, ¶¶ 8-9. The Arizona court also held that it was harmless error for the trial court to have found that

the murder was especially heinous, cruel or depraved, beyond a reasonable doubt. *Id.*, ___ Ariz. at ___, 72 P.3d at 1269, ¶ 14. The Arizona court found, however, that it was reversible error for the trial court, sitting without a jury, to have made findings on both statutory and non-statutory mitigation. *Id.*, ___ Ariz. at ___, 72 P.3d at 1270, ¶¶ 24-25. Because the Arizona Supreme Court was unable to conclude that a jury would have reached the same decision as the trial judge with regard to the weight of the mitigating evidence, the Arizona court remanded the case for resentencing by a jury, consistent with *Ring II*. *Id.*, ___ Ariz. at ___, 72 P.3d at 1270, ¶¶ 26-27.

As of this date, resentencing has been stayed. (*See* Appendix A (superior court minute entry)).

## JURISDICTION

Jones does not dispute that the Petitioner's Jurisdiction statement sets forth the proper time limitations, constitutional provisions and rules.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent argues that in addition to the Constitutional provisions set forth in Petitioner's petition that the Eighth Amendment is also implicated. It provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## REASONS FOR DENYING THE WRIT

### I. THE ARIZONA SUPREME COURT'S DECISION BELOW RESTS ON AN INTERPRETATION OF STATE PROCEDURAL LAW, AND REACHES A RESULT THIS COURT HELD PERMISSIBLE IN *CLEMONS V. MISSISSIPPI.*

The state's real dispute upon this certiorari application is not with the Arizona Supreme Court's application of their holdings in *Ring III* to the decision in *Jones*. Rather, the state actually seeks review of the holdings in *Ring III*. However, the state did not seek reconsideration of *Ring III* in the Arizona Supreme Court, or certiorari review of it in this Court; instead, the state elected to challenge *Ring III*, indirectly, using *Jones* as its vehicle for that purpose. Nevertheless, it is to *Ring III* that this Court must look to understand the outcome here, and when one does so, it is apparent that the state court acted well within its prerogative in both cases.

In *Ring III*, the Arizona Supreme Court held that the existence of one aggravating factor that is exempt from *Ring II*, or that is implicit in a jury's verdict, or that is supported by overwhelming or uncontroverted evidence, does not end that court's harmless error inquiry. The court explained that "...the procedures urged by the state [to end the harmless error inquiry after the finding of one aggravator is deemed harmless] do not reflect any sentencing procedure ever adopted by our legislature." *Ring III*, ___ Ariz. at ___, 65 P.3d at 943, ¶ 89. The court went on to describe the consistency of Arizona' statutory capital sentencing scheme that has always "...assigned to the same fact-finder the responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency." *Id.* The court explained that "[t]he process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme." *Id.* The Arizona court refused to "...speculate how the state's proposal would impact this essential

process." *Id.* The court then cited to *Johnson v. State*, 59 P.3d 450 (Nev. 2002), holding that *Ring II*, as applied to Nevada law, requires a jury to reweigh mitigating and aggravating factors. *Id.* The court held the same result obtained here.

The court also discussed the need to have a jury decide mitigating circumstances under Arizona law: "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty...." *Id.* at 946, ¶ 104. Citing Arizona's statute, the court concluded: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* In Respondent's case, the court declared that it "...[could] not conclude that the error here was harmless beyond a reasonable doubt" because it "...was unable to conclude that a jury faced with the same mitigating evidence, whether statutory or non-statutory, would have come to the same conclusion as the trial judge." *Jones*, 72 P.3d at 1270, ¶¶ 25-26.

This result is permissible under this Court's jurisprudence and dictated by the nature of Arizona's capital sentencing scheme. Arizona is a weighing state. *See State v. Richmond*, 180 Ariz. 573, 886 P.2d 1329 (1994). In *Clemons v. Mississippi*, this Court held that, when constitutional error occurred in a capital sentencing, appellate courts in weighing states could conduct harmless error review, but also could remand for resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990). As explained above, the Arizona Supreme Court has decided, in deference to the Arizona legislature's policy of requiring jury sentencing, that it should remand in all cases where it cannot say beyond a reasonable doubt that no reasonable jury would have imposed death. That is clearly a permissible choice under *Clemons*.

In fact, Respondent argued below that it is the only constitutionally permissible choice, as this sort of error is not properly subject to harmless error review. See Argument III A, *infra*. Although the Arizona Supreme Court held otherwise, its determination of the form that harmless error review should take and the result that review should have in cases such as Respondent's, was reasonable and well within the parameters set by this court in *Clemons*.

This Court does not sit to review such decisions of state law, state criminal procedure and state sentencing policy. *See* Sup. Ct. Rule 10; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). ("[I]f resolution of a federal question cannot affect the judgment, there is nothing for th[is] Court to do.") This Court has given its guidance regarding the Sixth Amendment in *Ring II*. It should now "...provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference." *Arizona v. Evans*, 514 U.S. 1, 2 (1995), quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Even if this Court were to review the state law decision in this case, however, it would find that the Arizona Supreme Court's decision is a sensible one and is true to the legislative intent that was the Arizona Supreme Court's guide. Arizona has always viewed capital sentencing as something that involves qualitative as well as quantitative determinations. *State v. Van Adams*, 984 P.2d 16, 29 (Ariz. 1999) (noting that supporting evidence of cruelty affects the strength of the cruelty factor, not its existence), citing *State v. McKinney*, 917 P.2d 1214, 1225 (Ariz. 1996) (when conducting an independent review of the evidence, consideration is given to the "quality and strength of the aggravating and mitigating factors"). The court has long recognized that Arizona's capital sentencing statute does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances. *State v. Mauro*, 159 Ariz. 186, 208, 766 P.2d 59, 81 (Ariz. 1988); *State v. Brookover*, 124 Ariz. 38, 42, 601 P.2d 1322, 1326 (Ariz. 1979). ("One mitigating

circumstance…may be 'sufficiently substantial' to outweigh two aggravating circumstances.") The court has explained:

> We do not believe the legislature intended the court to play a numbers game and automatically apply the death penalty when the number of aggravating circumstances found exceeded the number of mitigating circumstances found, any more than it intended to require life imprisonment when the number of mitigating circumstances found exceeded the number of aggravating circumstances found.

*State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (Ariz. 1982). For this reason, as the Arizona Supreme Court noted, the Arizona legislature has always felt it appropriate to put all decisions relating to capital sentencing—aggravation, mitigation, and penalty—in the hands of a single sentencer, who can bring the same qualitative judgment to the assessment of aggravation, mitigation and penalty. *Ring III*, ___ Ariz. at ___, 65 P.3d at 943.

This case shows why that approach makes sense. The mitigating evidence adduced in this case, which evidence the Arizona court declined to discount, went both to the severity of the especially heinous, cruel and depraved factor, as well as to the magnitude of the mitigation. The mitigating evidence and information regarding the defendant's mental state and history adduced below went both to the severity and weight to be given to the heinous, cruel and depraved factor, as well as to the mitigation to be weighed against them. This factor was directly related to the defendant's background and disorders. The "heinousness" based on "gratuitous violence" and the "senselessness and helplessness [of the victim]" is directly attributable to the Respondent's cognitive disorder and dysfunctional upbringing. To view those aggravating facts in isolation, and without the truer picture provided by the life history information, would be to fail to fully assess their weight, as well as their identity and number, which Arizona requires. To artificially divide up the task of

assessing aggravation and mitigation in light of such background facts would increase the chance of error and arbitrariness in capital decision-making. That no doubt is why the Arizona legislature felt it appropriate to put the sentencing decision in the hands of a single sentencer, under both the former, and recently enacted sentencing schemes. And, that no doubt is why the Arizona Supreme Court decided to follow that state legislative dictate in this case and others it reviewed after *Ring II*.

In any event, Arizona's decision to do that does not offend or contravene anything in the federal constitution, or this Court's applicable decisions. To the contrary, it is a choice specifically left open to the states by *Clemons*, and by *Ring II*. *Ring II*, 536 U.S. at 609, n. 7. The exercise of that choice does not call for certiorari review by this Court.

Petitioner emphasizes the different results obtained by several state courts in applying *Ring II* to individual state sentencing schemes. This result, however, obtains because each state sentencing scheme is unique, and each state's law must be applied to that scheme in light of state policy and practice. As noted in *Ring III*, the Nevada Supreme Court's decision on this issue was controlled by Nevada law.[1]

Similarly, in *Woldt v. People*, the Colorado Supreme Court held that Colorado's "...three-judge panel capital sentencing statute...is unconstitutional on its face under *Ring*," and that defendants sentenced under that statute were entitled to resentencing. *Woldt v. People*, 64 P.3d 256, 262 (Colo. 2003). The Court cited to Colorado law in interpreting the Colorado death penalty statute

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[1] The court held: "Nevada statutory law requires two distinct findings to render a defendant death eligible: 'The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.' This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing." *Johnson v. State*, 59 P.3d at 460 (italics in original)(footnote omitted).

in determining which jury findings were eligibility findings. *Id.*, at 264 (quoting *People v. Dunlap*, 975 P.2d 723, 736 (Colo. 1999)).

The legal landscape developing after *Ring II* may not be homogenous, but it is not in conflict. Each state has interpreted this Court's decision according to its state capital punishment laws, and so long as those decisions do not violate the requirements of *Ring II* and were left open to them in *Clemons*, that is all this Court requires.

The state complains that 26 capital cases will be affected by this decision. However, of the 31 cases on direct appeal when *Ring II* was announced, seven have been resolved on grounds other than *Ring II*, and in three cases similar to Jones', the time for filing certiorari has already run without a petition from the state. At this rate, only this and a handful of other cases would be affected were this court to accept, wholesale, Arizona's arguments in this petition. More importantly, this Court has already denied certiorari on *Arizona v. Pandeli*, ___ U.S. ___, 124 S.Ct. 386 (Mem)(2003), and *Arizona v. Tucker*, ___ U.S. ___, 124 S.Ct. 467(Mem)(2003), cases that raise issues identical to those in Respondent's case. Rather than delay capital proceedings in Arizona for yet another year, fairness and judicial economy favor allowing the jury resentencings in Arizona now to begin.

## II. PETITIONER'S ARGUMENT IGNORES ARIZONA LEGISLATION ENACTED SINCE *RING II*, WHICH CREATED A RIGHT TO A JURY TRIAL ON ALL PHASES OF CAPITAL SENTENCING.

Conspicuously absent from the state's analysis is the capital statutory sentencing scheme enacted by the Arizona legislature following *Ring II*. This Court's decision in *Ring II* rendered Arizona's capital sentencing provisions unconstitutional. The state immediately responded by enacting a new statutory scheme that requires a jury to determine all aggravators and mitigators, as

well as balance them in order to decide whether to impose death. *See* Act of Apr. 27, 2001, ch. 260, § 1, 2001 Ariz. Sess. Laws 1334 (Ariz. Rev. Stat. Ann. (A.R.S.) § 13-703.01). (Appendix B).

A state may not adopt a valid statute and then decide willy-nilly to ignore it. Yet, Petitioner wants to do exactly that. Nothing in the decision of the Arizona Supreme Court deciding the impact of *Ring II* on remand, or under the individual facts of Jones' case, is inconsistent with the statutory scheme enacted by the Arizona Legislature. Moreover, the Arizona Supreme Court held in *Ring III* that applying Arizona's new sentencing statutes does not violate federal or state prohibitions against Ex Post Facto application of law. There is no suggestion by the State of Arizona that the new statute under which Jones will be sentenced is unconstitutional.

## III. THE ARIZONA SUPREME COURT'S DISPOSITION OF THIS CASE CAN AND SHOULD BE AFFIRMED ON OTHER GROUNDS.

If certiorari were granted, this Court would have to consider whether the Arizona Supreme Court's decision is correct for other reasons that were argued to it, but not necessarily adopted by it before considering relief on the ground urged by Petitioner. There are a number of such reasons that should lead this Court to affirm the decision below. *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991) (decision may be affirmed on grounds other than those stated by a lower court).[2]

[2] Because Respondent is not seeking to change the judgment below, which properly ordered a full sentencing retrial, he has not filed a formal cross petition raising these issues, but would seek to have them considered in the event certiorari were granted. *See*, ROBERT L. STERN, et al., SUPREME COURT PRACTICE, at 363-64 (7th Ed. 1993).

### A. Denial of the Jury Trial Right Guaranteed by *Ring* is Structural Error That should Not be Subject to Harmless Error Review.

This Court has held that unlike an error in the trial process itself, structural defects in the constitution of the trial mechanism can never be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Thus, this Court has refused to find harmless error when the right to jury trial has been altogether denied, because in that instance, "...the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

That is precisely the case here. The error was not one by the trial judge, or in the trial process, but rather in the statutory structure governing capital sentencing that altogether denied capital defendants their Sixth Amendment right to have eligibility determinations made by a jury beyond a reasonable doubt. The Arizona statute assigned to the wrong entity the job of determining the defendant's "capital guilt." As the two *Ring III* dissenters recognized, harmless error review in cases such as this "...puts the [appellate court] in the position of speculating about one of the great unknowables—what a non-existent jury would have done." *Ring III*, 204 Ariz. at 567, 65 P.3d at 948, ¶ 114 (Feldman, J., concurring in part and dissenting in part). Harmless error analysis cannot apply in such a case.

### B. The Jury Trial Right Recognized in *Ring* Properly Applies to the Aggravation/Mitigation Balance in States That Make that Assessment an Eligibility Factor.

Although this Court did not reach the question in *Ring II*, the Arizona Supreme Court's analysis of the weighing question is also correct under federal law. The rule of *Ring II* is this: "Capital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.*, 536 U.S. at 589. Put in context, if a state

conditions a sentence of death on the fact that mitigating factors do not outweigh aggravating factors, a jury determination is required. Arizona has done precisely that. The weighing finding in Arizona is not, and never has been, a stage at which the fact-finder selects whether or not the defendant should receive death. In fact, until and unless the weighing factor is found, a defendant is categorically excluded from receiving the death penalty. *Ring II* requires that the jury verdict reflect the facts the jury found beyond a reasonable doubt "...necessary to put...[the capital defendant] to death." *Ring III*, 536 U.S. at 609. Because the weighing calculus is a necessary factor in an Arizona death sentence, it must be found by a jury beyond a reasonable doubt.

A consensus has developed among all but two death sentencing states that this factor must be determined by a jury, indicating almost total acceptance of the notion that the weighing factor is indeed an element of capital murder. This broad recognition in all relevant states that weighing is an element of the crime of capital murder adds force to Justice Breyer's concurring opinion in *Ring II*, and merits further review by this Court.

### C. The Logic of *Ring II*, and Developments Since *Ring II*, Make it Apparent That Judge-Only Capital Sentencing is Unconstitutional Under the Sixth, Eighth and Fourteenth Amendments, and *Spaziano* and *Cabana* Should be Overruled.

The Constitution requires special safeguards in capital cases. *Gregg v. Georgia*, 428 U.S. 153 (1976). In addition to all of the reasons set forth in Justice Breyer's concurring opinion in *Ring II*, the evidence of legislative and judicial agreement since *Ring II* that the weighing of aggravating and mitigating circumstances is an element of the crime of capital murder demonstrates that juries must make the ultimate sentencing decision. If this Court grants Arizona's request for certiorari review, this Court should also consider that evolving standards of decency require that *Spaziano v. Florida*, 468 U.S. 447 (1984), be overruled on that basis.

Considering statutes enacted both before and after *Ring II*, 36 states have now given sentencing authority to juries. Only Montana and Nebraska fail to do so. MONT. CODE ANN.'46-18-301; NEB. REV. STAT.' 29-2521. All but three of the 36 states make jury determinations of sentencing controlling.[3] This is an overwhelming indication that jury sentencing is required by the Eighth Amendment and is an established part of due process. *See Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002) (discussing 18 states that prohibit the execution of the mentally retarded in judging evolving standard of decency by legislative decision), *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (noting that only eight states permitted death sentences in cases where the defendant participated in the underlying felony but did not attempt or intend to kill). Given the nearly unanimous enactment of jury sentencing by state legislatures, Justice Breyer's dissent in *Ring II* is correct. *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Cabana v. Bullock*, 474 U.S. 376 (1986), should be overruled and these questions, too, will necessarily be included in the issues presented by case, if certiorari is granted here.

[3] Only in Florida, Alabama, and Delaware do judges retain sentencing authority after the jury's decision is reached. FLA. STAT. CHA § 921.141; ALA. CODE § 13A-5-47 (1975); DEL. CODE ANN. Tit. 11, § 4209. In Florida, the jury's sentence determination must be considered and given great weight. *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). Alabama requires the sentencing judge to consider the jury's recommendation of sentence before making its decision. ALA. CODE § 13A-5-47 (1975).

## CONCLUSION

Because the Arizona Supreme Court's decision rests on state law, and because the disposition of the case this petition challenges is correct for a number of reasons in addition to those adopted by the Arizona Supreme Court, the petition for certiorari should be denied. If the petition is granted, the Arizona Supreme Court's decision should be affirmed for all the reasons set out above.

RESPECTFULLY SUBMITTED this 5th day of December, 2003.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

EDWARD FILMORE MCGEE
Deputy Public Defender
(Counsel of Record)
411 North Central Ave., Suite 670
Phoenix, Arizona 85004
(602) 506-0924
State Bar Attorney No. 004235
*Lawyer for Respondent*

No. 03-515

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2003**

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**STATE OF ARIZONA**

Petitioner,

vs.

**ANTOIN JONES**

Respondent.

---

**APPENDICES TO**

**PETITION FOR WRIT OF CERTIORARI**

**TO THE**

**SUPREME COURT OF THE STATE OF ARIZONA**

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EDWARD FILMORE MCGEE
Deputy Public Defender
(Counsel of Record)
411 North Central Ave., Suite 670
Phoenix, Arizona 85004
(602) 506-0924
State Bar Attorney No. 004235
*Lawyer for Respondent*

# APPENDIX A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1996-004691 08/20/2003

HON. STEPHEN A. GERST

CLERK OF THE COURT
N. Hannahoe
Deputy

FILED: 08/25/2003

STATE OF ARIZONA PAUL J MCMURDIE

v.

ANTOIN JONES GARY J BEVILACQUA

MINUTE ENTRY

There being no objection by defendant,

IT IS ORDERED granting State's Motion to Stay Proceedings to 10/06/2003.

# APPENDIX B

**ARIZONA REVISED STATUTES ANNOTATED**
**TITLE 13. CRIMINAL CODE**
**CHAPTER 7. IMPRISONMENT**

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§ 13-703.01. Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions

**A.** If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death. If the state has not filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

**B.** Before trial, the prosecution shall notice one or more of the aggravating circumstances under § 13-703, subsection F.

**C.** If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

**D.** If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

**E.** At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.

**F.** The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under § 13-703, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

**G.** At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

**H.** The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.

**I.** If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

**J.** At the aggravation phase, iF the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of

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the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

**K.** At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

**L.** If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

**M.** Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.

**N.** If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

**O.** In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.

**P.** The trier of fact shall make all factual determinations required by this section or the constitution of the United States or this state to impose a death sentence.

**Q.** Subject to the provisions of § 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.

**R.** For the purposes of this section:

1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.

2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

CREDIT(S)

2002 Electronic Pocket Part Update

Added by Laws 2002, 5th S.S., Ch. 1, § 3, eff. Aug. 1, 2002.

**HISTORICAL AND STATUTORY NOTES**

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Laws 2002, 5th S.S., Ch. 1, § 7, subsec. A, provides:

**"Sec. 7. Applicability**

"**A.** Sections 13-703 and 13-703.02, Arizona Revised Statutes, as amended by this act, and § 13-703.01, Arizona Revised Statutes, as added by this act, apply to any sentencing or resentencing proceeding on any first degree murder case that is held after the effective date of this act."

Laws 2002, 5th S.S., Ch. 1, § 8, provides:

**"Sec. 8. Severability**

"If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Laws 2002, 5th S.S., Ch. 1, § 9, eff. Aug. 1, 2002, provides:

**"Sec. 9. Intent**

"**A.** It is the intent of the Legislature that:

"1. There be no hiatus in the imposition of the death penalty in this state as a result of the United States Supreme Court decision in Ring v. Arizona, 530 U.S._____ (2002).

"2. Those persons who were previously sentenced to death in this state not be entitled to a new sentencing proceeding pursuant to this act if they have already exhausted direct appeals of their sentences.

"3. The adoption of the new capital jury sentencing procedures contained in this act shall not be construed by any state or federal court as a legislative statement that the former judge sentencing procedures are unconstitutional or that any death sentence imposed pursuant to the former procedure is invalid.

"4. Cases under supreme court review that are found to need resentencing be remanded to the superior court for resentencing under this act.

"**B.** It is not the intent of the Legislature to provide for any right of or basis for appeal or commutation that did not exist before the effective date of this act."

Former § 13-703.01 was renumbered as § 13-703.04.

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## LAW REVIEW AND JOURNAL COMMENTARIES

Arizona Supreme Court: Its 2000-2001 decisions; civil cases. David Kader, 34 Ariz.St.L.J. 371 (2002).

Muzzling death row inmates: Applying the first amendment to regulations that restrict a condemned prisoner's last words. Kevin Francis O'Neill, 33 Ariz. St.L.J. 1159 (2001).

Effects of clinical and scientific expert testimony on juror decision making in capital sentencing. Daniel A. Krauss and Bruce D. Sales, 7 Psychol. Pub. Pol'y & L. 267 (June 2001).

## UNITED STATES SUPREME COURT

Counsel, effective assistance, death penalty case, failure to offer mitigating evidence and waiver of closing argument at sentencing hearing, presumption of prejudice, federal habeas review, see Bell v. Cone, 2002, 122 S.Ct. 1843.

Death sentence,

Mentally retarded criminals, cruel and unusual punishment, see Atkins v. Virginia, 2002, 122 S.Ct. 2242.
Trial judge determination of presence or absence of aggravating factors, violation of Sixth Amendment right to jury trial, see Ring v. Arizona, 2002, 122 S.Ct. 2428.

A. R. S. § 13-703.01

AZ ST § 13-703.01

END OF DOCUMENT

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No. 03-515

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**OCTOBER TERM, 2003**

---

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vs.

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Respondent.

---

**RESPONDENT'S AFFIDAVIT OF MAILING**

EDWARD FILMORE MCGEE deposes and says:

I am a member of the Bar of the Supreme Court of the United States. On the 5th day of December, 2003, I delivered for deposit in the mail of the United States Postal Service an envelope addressed to the Clerk of the Supreme Court of the United States, first-class mail, postage prepaid, containing 10 copies of the Respondent's Brief In Opposition in the above-entitled case.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

EDWARD FILMORE MCGEE
Deputy Public Defender
(Counsel of Record)
411 North Central Ave., Suite 670
Phoenix, Arizona 85004
(602) 506-0924
State Bar Attorney No. 004235
*Lawyer for Respondent*

SUBSCRIBED AND SWORN to before me this 5th day of December, 2003.

Lucia M. Herrera
NOTARY PUBLIC

My commission expires:

May 2, 2005

OFFICIAL SEAL
LUCIA M. HERRERA
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires May 2, 2005

No. 03-515

---

**IN THE**

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**OCTOBER TERM, 2003**

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Respondent.

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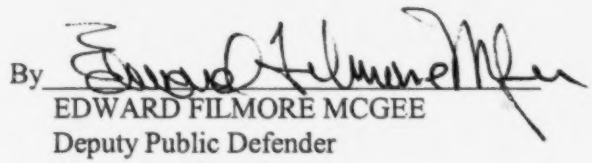
**PROOF OF SERVICE**

I, Edward Filmore McGee, do certify that on this 5th day of December, 2003, as required by Supreme Court Rule 29, I served the foregoing Motion for Leave to Proceed *In Forma Pauperis* and Respondent's Brief In Opposition to each party in the above proceeding or the party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States Mail properly addressed to counsel for the State of Arizona, Dawn M. Northup, Assistant Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007, Mr. Antoin Jones, #148403 Arizona State Prison Complex, Eyman - SMU II /Death Row, P.O. Box 3400, Florence, Arizona 85232, Noel K. Dessaint, Clerk, Arizona Supreme Court, 1501 West Washington Street, Phoenix, Arizona 85007, each of them with first-class postage prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 5th day of December, 2003.

MARICOPA COUNTY PUBLIC DEFENDER

By 

EDWARD FILMORE MCGEE
Deputy Public Defender
(Counsel of Record)
411 North Central Ave., Suite 670
Phoenix, Arizona 85004
(602) 506-0924
State Bar Attorney No. 004235
*Lawyer for Respondent*